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IN THE

SUPREME COURT OF THE UNITED STATES

I. M. FUTCH *et al.*
Petitioners

v.

D. C. GREER *et al.*
Respondents

APPLICATION FOR WRIT OF CERTIORARI

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NO.....

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Come now I. M. Futch *et al*, Petitioners, and petition this Honorable Court to issue its Writ of Certiorari to the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo, Texas to review that said Court's final decision in Case Number 7095 on the docket of said Court, and styled I. M. Futch *et al* v. D. C. Greer *et al*, reported in 353 S.W.2d 896, a copy of which is attached hereto as Appendix "A", and in support of said petition would respectfully show unto this Honorable Court the following:

JURISDICTION

The jurisdiction of this Honorable Court is sought to be invoked on the grounds that Petitioners are being deprived of their property by arbitrary *federal action* in violation of the due process clause of the 5th Amendment to the Constitution of the United States, and by arbitrary *state action* in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

The final decision of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo, Texas, herein sought to be reviewed, was rendered by said Court on the 5th day of February, 1962; Petitioners' Motion For Rehearing was denied on the 26th day of February, 1962. In an effort to obtain a review of this decision, Petitioners filed their Application for Writ of Error in the Supreme Court of Texas on March 26, 1962, which was denied, no reversible error, without written opinion by said Court on the 11th day of July, 1962. Petitioners filed their Motion for Rehearing in the Supreme Court of Texas on the 25th day of July, 1962, which said motion was overruled without written opinion on the 3rd day of October, 1962.

The statutory provision herein relied upon to confer upon this Honorable Court jurisdiction to review the judgment below is Title 28, United States Code, Section 1257, in its pertinent parts as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision

could be had, may be reviewed by the Supreme Court as follows: * * *

"(3) By writ of certiorari, * * * where any * * * right, * * * is specially set up or claimed under the Constitution, * * * of, * * * the United States. June 25, 1948, c. 646, 62 Stat. 929."

QUESTIONS PRESENTED

1. Whether the certification by a state highway department that it has considered the economic effects of the location of a Federal-aid highway in conformity with Title 23, United States Code, Section 128(a) is reviewable on the grounds that reasonable consideration was not given such economic effect in the light of the announced purposes of Title 23, United States Code.

2. Whether certain provisions of Article 6674w-1, Vernon's Annotated Civil Statutes of the State of Texas, are satisfied by a public hearing being held during which no member of the public was permitted to discuss or express his or her views concerning the design and schematic layout of a Federal-aid highway.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment to the Constitution of the United States, in its pertinent parts, as follows:

"No person * * * shall be deprived of * * * property, without due process of law; * * * *"

The Fourteenth Amendment to the Constitution of the United States, in its pertinent parts, as follows:

"Sec. 1 * * * no state shall * * * deprive any person of * * * property without due process of law: * * * *."

Title 23, United States Code, in its pertinent parts as follows:

* * * * *

"Section 101 (b). It is hereby declared to be in the national interest to accelerate the construction of the Federal-aid highway systems, including the National System of Interstate and Defense Highways, since many of such highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce, for the national and civil defense.

"It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereafter referred to as the "Interstate System", is essential to the national interest and is one of the most important objectives of this Act. It is the intent of Congress that the Interstate System be completed as nearly as practicable over the period of availability of the thirteen years' appropriations authorized for the purpose of expediting its construction, reconstruction, or improvement, inclusive of necessary tunnels and bridges, through the fiscal year ending June 30, 1969, under section 108(b) of the Federal-Aid Highway Act of 1956 (70 Stat. 374), and that the entire System in all States be brought to simultaneous completion. Insofar as possible in consonance with this objective,

existing highways located on an interstate route shall be used to the extent that such use is practicable, suitable, and feasible, it being the intent that local needs, to the extent practicable, suitable, and feasible, shall be given equal consideration with the needs of interstate commerce. Added Pub. L. 85–767, § 1, Aug. 27, 1958, 72 Stat. 885, amended Pub. L. 86-70, § 21(e) (1), June 25, 1959, 73 Stat. 146; Pub. L. 86-624, § 17(a), July 12, 1960, 74 Stat. 415.

* * * * *

"Section 103 (d). The Interstate System shall be designated within the United States, including the District of Columbia, and it shall not exceed forty-one thousand miles in total extent. It shall be so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense and, to the greatest extent possible, to connect at suitable border points with routes of continental importance in the Dominion of Canada and the Republic of Mexico. *The routes of this system, to the greatest extent possible, shall be selected by joint action of the State highway departments of each State and the adjoining States, subject to the approval by the Secretary as provided in subsection (e) of this section.* All highways or routes included in the Interstate System as finally approved, if not already coincident with the primary system, shall be added to said system without regard to the mileage limitation set forth in subsection (b) of this section. This system may be located both in rural and urban areas.

"(e) The *Secretary shall have authority to approve in whole or in part the Federal-aid primary system, the Federal-aid secondary system,*

and the Interstate System, as and when such systems or portions thereof are designated, or to require modifications or revisions thereof. No Federal-aid system or portion thereof shall be eligible for projects in which Federal funds participate until approved by the Secretary."

* * * * *

"Section 128 (a). *Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic effects of such a location.* Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway.

"(b). When hearings have been held under subsection (a), the State highway department shall submit a copy of the transcript of said hearings to the Secretary, together with the certification. Added Pub. L. 85-767, § 1, Aug. 27, 1958, 72 Stat. 902." [italics supplied]

Vernon's Ann. Civ. St. of Texas, Article 6674w, in its pertinent parts as follows:

"Purposes. The Legislature finds, determines and declares that the purpo. of this Act

is to delegate certain additional authority to the State Highway Commission to promote the Public Safety, to facilitate the movement of traffic, *to preserve the financial investment of the public in its highways and to promote the National Defense.* * * * Acts 1957, 55th Leg. P. 724, ch. 300, § 1.

* * * * *

"Article 6674w-1 1. Authorization for Modernization of Highway Facilities. To effectuate the purposes of this Act, the State Highway Commission is empowered to lay out, construct, maintain, and operate a modern State Highway System, with emphasis on the construction of controlled access facilities and to convert, wherever necessary, existing streets, roads and highways into controlled access facilities. * * * provided, however, that in the case of any project involving the bypassing of or going through any county, city, town, or village, including Home Rule Cities, the State Highway Commission shall afford the opportunity for not less than one (1) public hearing in the locality before an authorized representative of the State Highway Commission, *at which persons* interested in the development of the project *shall have the opportunity* for attendance, *discussion* and inspection of the design and schematic layout presented and filed with the governing body of such county, city, town or village, including Home Rule Cities, at least seven (7) days before the public hearing, by the State Highway Department. Such hearing shall be held not less than three (3) days nor not more than ten (10) days after the publication in the locality of notice of such hearing * * * Added Acts 1957, 55th Leg., P. 724, Ch. 300." [italics supplied]

STATEMENT

This is a suit to prohibit the construction of an Interstate Highway.

As stated by the Court below, "suit [was] brought by a group of citizens of the City of Amarillo as a class action, seeking an injunction against D. C. Greer, the State Highway Engineer and the members of the State Highway Commission and the City of Amarillo, its mayor, the city commission and city manager, to restrain the named defendants from designating, laying out, opening and constructing Interstate Highway Number 40 through the City of Amarillo. All parties filed motions for summary judgment. The City of Amarillo and its officials also filed a motion to dismiss on the ground the city and its officials were neither necessary nor proper parties to this suit. This latter motion was granted. The trial court entered a judgment granting the motion for summary judgment of Greer and the Highway Commission, denied the motion of appellants, and dismissed the City of Amarillo and its officials from the suit."

On appeal to the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo, the judgment of the trial court was affirmed. The decision of the Court of Civil Appeals was denied a review by the Supreme Court of Texas, resulting in the decision of the Court of Civil Appeals becoming final. It is this final decision Petitioners ask this Honorable Court to review.

The facts material to the consideration of the questions presented may be stated as follows:

During or prior to 1957, the Texas Highway Department, desiring to avail itself of the benefits of Title 23, United States Code, submitted to the Secretary of Commerce of the United States for his approval a program of proposed road projects for the utilization of funds apportioned to Federal-aid highways, among which was a program for the location of Interstate 40 through the City of Amarillo, Texas. For the purpose of complying with Title 23, United States Code, Section 128(a), the Texas Highway Department held a "public hearing" in Amarillo, Potter County, Texas in the City Auditorium at 7:30 P. M. on August 2, 1957. For the purpose of complying with Title 23, United States Code, Section 128(b), the Texas Highway Department recorded the entire proceedings of this "public hearing," which, along with a proper certification by Respondent D. C. Greer that the economic effects of the location of such proposed highway had been considered by the Highway Department, was forwarded to the Secretary of Commerce. *It is the reasonableness of the consideration given the economic effects of the location evidenced by the certification that petitioners challenge on the grounds of a denial of due process of law.*

Later, on October 29, 1958, for the purpose of complying with Article 6674w-1, Vernon's Annotated Civil Statutes of Texas, the Texas Highway Department held an event in the City Auditorium in the City of Amarillo, Potter County, Texas, which event is variously described in the record herein as a "public information meeting" or "public hearing." The Texas Highway Department, as it had done at

the previous event of August 2, 1957, prepared a verbatim transcript of this later event of October 29, 1958, a copy of which appears in the record herein under Exhibit "A" to Defendants' [Respondents here] reply to Plaintiffs' [Petitioners here] motion in the trial court for summary judgment. This transcript indicates that *the event amounted to nothing more than an occasion for the dissemination of information to the public by the Texas Highway Department.* The transcript further reflects that *no individual was permitted to discuss the design and schematic layout of the proposed highway.* It is the failure of the Petitioners to be afforded this right, secured to them by Texas law, of which they complain on the grounds of a denial of due process of law.

Both questions herein presented for review were initially raised by Plaintiffs [Petitioners here] in their Original Petition, the pleading which commenced this law suit.

Paragraph 14 (1), found on page 11 of Plaintiffs' [Petitioners here] Original Petition, raised the reasonableness of the consideration by the Texas Highway Department of the economic effects of the location of the proposed highway, as follows:

* * * * *

> "(i) There was no consideration whatsoever had as to the economic effects of the Federal Interstate Defense Highway on the City of Amarillo or upon the citizens of Amarillo and these Plaintiffs [Petitioners here] and their property or as to the cost of the location of such highway as compared to the cost of other

routes available to the Defendants [Respondents here], * * * * ."

Section 12 of Plaintiffs' [Petitioners here] Original Petition, found on page 8 thereof, raised the question of the validity of the hearing of October 29, 1958 relative to the requirements of Article 6674w-1 Vernon's Annotated Civil Statutes of Texas, as follows:

> "The first and only time that any semblance of a schematic design of such Federal Interstate Defense Highway was made known or available to the citizens of Amarillo was some four months ago and, at which time, the Defendants [Respondents here] in control of presentation of such schematic design to the public, during a so-called public hearing, advised the public through television, local newspapers and other medium of public information that in no event and under no circumstances or conditions would there be a discussion either pro or con pertaining to such schematic design or as to any particular effect or feature of the Federal and State Interstate Highway System being located in the City of Amarillo as proposed. Thus, the citizens of Amarillo have never been given an opportunity to discuss the pros and cons of any schematic design or to discuss the features thereof on any intelligent basis because *at the time they were given such opportunity there was no information or schematic design available to the citizens of Amarillo for discussion pro and con.* The result of such action of the part of Defendants [Respondents here] is that Plaintiffs [Petitioners here] have been deprived of their statutory rights to see a schematic design and the proposed type of construction of such highway and its result and from such information prepare them-

selves to discuss the same, pro and con, at a public hearing as provided by both Federal and State Law." [italics supplied]

Both questions herein presented for review were effectively denied by the trial court's judgment of December 28, 1960, wherein the Plaintiffs' [Petitioners here] Motion For Summary Judgment was in all things denied and where it was ordered by the court that Plaintiffs [Petitioners here] take nothing by their suit.

The questions presented were preserved in the proceedings before the appellate court below by various assignments of error in Appellants' [Petitioners here] brief in said court.

The question relating to the reasonableness of the consideration of the economic effects of the location of the highway was preserved in the appellate court below by assignment of error in the Appellants' [Petitioners here] brief in said court under Point Of Error Number Five, found on page 3 of said brief, as follows:

"Point Five

"The appellants in support of their motion for summary judgment having duly filed an affidavit revealing that no economic survey was ever had as to the effects of constructing Interstate Highway Number 40 through the City of Amarillo which affidavit is not controverted by any counter affidavit on the part of Appellees [Respondents here] Appellants' [Petitioners' here] motion for summary judgment should have been granted."

And on page 13 of said brief, under the paragraph denominated Statement under 5th Point, the following is found in support of Appellants' [Petitioners here] Point Of Error Number Five,

> "It is undisputed that the State Highway Department had never considered the economic effects of constructing this Federal-aid highway project through the City of Amarillo".

On page 14 of Appellants' [Petitioners here] brief in the appellate court below is set out Section 128(a) of Title 23, United States Code, which is that section relating to the requirement that certification be made that the economic effects of the location of the proposed highway have been considered, and presents further argument relating to the failure in this respect.

The question relating to whether the event of October 29, 1958 complied with Article 6674w-1, Vernon's Civil Statutes of Texas, was preserved in the appellate court below by assignment of error in the Appellants' [Petitioners here] brief in said court under Point Of Error Number Three, found on page 10 of said brief, as follows:

"Point Three

> "Appellants' affidavits and the undisputed record revealing that *no public hearing was had prior to the laying out and constructing of the said Interstate Highway Number 40 as required by both State and Federal Law*, the court erred in not granting a summary judgment for the appellants." [italics supplied]

And on page 11, under the section of the brief denominated Argument under Point Three, the following is found in support of this point of error:

> "One of the fundamental requirements of Article 6674w-1, Vernon's Annotated Texas Statutes, is that a *public hearing be had in the locality before an authorized representative of the State Highway Commission and that persons interested in the development of the project shall have the opportunity for attendance, discussion* and inspection *of the design and schematic layout presented* and filed with the governing body of such city, town or village, including Home Rule Cities. Since Appellees [Respondents here] wholly failed to comply with the statutory requirements as to laying out and constructing Interstate Highway Number 40, the court erred in not granting Appellants [Petitioners here] a summary judgment enjoining Appellees [Respondents here] from taking the citizens' property and the laying out of such highway through the City of Amarillo." [italics supplied]

Appellants [Petitioners here] further urged the questions herein presented for review in the appellate court below by their assignments of error numbers 7 and 8 appearing on page 17 of their brief in said court, as follows:

> "Seventh Point
>
> "The trial court erred in holding that the failure of the Appellees [Respondents here] to comply with *Federal Laws* pertaining to United States Interstate Defense Highways did not violate the due process clause of the Federal Constitution. [italics supplied]

"Eighth Point

"The trial court erred in holding that the failure of the Appellees [Respondents here] to comply with the *State Laws* pertaining to highways did not violate the due process clause of the Federal Constitution." [italics supplied]

The points of error preserving the questions herein presented were rejected by the Amarillo Court of Civil Appeals in its opinion rendered on February 5, 1962, as follows:

"[6] Appellants' next four points of error complain of the trial court's failure to grant their motion for summary judgment on the ground that four specific requirements had not been met by appellees in locating and planning the highway in question. It is appellants' position that it is undisputed that appellees conducted no public hearing prior to laying out and constructing the interstate highway; that no schematic design had been presented at a public hearing; that no economic survey had been conducted; and that the Federal laws had not been complied with in selecting the route, design, etc., of the proposed highway. Because of the similarity of these matters they will be discussed together.

"The supporting affidavit of the district engineer, Charles W. Smith, clearly states that a public hearing was held in the Amarillo Municipal Auditorium on Friday, August 2, 1957, relative to the location of the route of the proposed highway. Details of this meeting were set out in the affidavit. Mr. Smith's affidavit further points out a second public hearing was held at the same location on

October 29, 1958 where a schematic layout of the proposed highway was presented for public inspection. In our opinion the affidavits of appellants which are of record in this case do not effectively contradict the above referred to affidavit of Mr. Smith, and do not raise a fact issue as to these hearings. The public hearings so held were in full compliance with Article 6674w-1, Sec. 1, Vernon's Ann. Tex.Civ.St. Title 23 U.S.C.A. § 128 provides:

> '§ 128. Public hearings
>
> '(a) Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic effects of such a location.'

"Mr. Smith's affidavit stated in part as follows:

> 'Everyone present was afforded the opportunity to speak with reference to the route for Interstate Highway 40. A record was made of the various speakers, their comments, criticisms, and suggestions, and a transcript of this record was forwarded on August 30, 1957 to the Bureau of Public Roads along with a certification by D. C. Greer, the State Highway Engineer, that due consideration had been given the economic effects of the proposed location of the highway. The central route of such highway through the city of Amarillo was thereupon approved by the United States Bureau of Public Roads and the Texas Highway Commission.'

"In our opinion the record is clear that appellees have fully complied with the requirements of the applicable State and Federal statutes and appellants' summary judgment evidence does not raise a material fact issue.

"[7] Appellants further contend that Federal rather than State statutes govern in determining the location, laying out and constructing this interstate highway; that in as much (sic) as the Federal statutes had not been complied with in these respects the trial court erred in granting appellees' motion for summary judgment. We think appellants are in error in their contention that the Federal statutes were not complied with. We find nothing in this record to support appellants' assertion. According to Mr. Greer's deposition, Federal funds had not been received by the State at the time his deposition was taken in May of 1960. By complying with Federal regulations the State would be reimbursed by the Federal government for certain sums previously expended by the State. The two hearings referred to above were held for a two-fold purpose: to comply with Article 6674w-1, V.T.C.S. and Title 23, Sec. 128, U.S.C.A. The Federal regulations must be complied with in order to receive Federal funds. Such requirements do not limit or effect the authority of the State Highway Commission to select locations, construct and maintain highways in this State. State Highway Commission v. Humphreys (Tex. Civ.App.), 58 S.W.2d 144 (writ refused); Heathman v. Singletary (Tex.Comm.App.), 12 S.W.2d 150. See also Linnecke v. Dept. of Highways, 76 Nev. 26, 348 P.2d 235; Piekarski v. Smith (Del.),

153 A.2d 587. Appellants' sixth point of error is overruled.

"[8] Appellants' last four points of error complain that the trial court's judgment violated the due process clauses of both the Federal and State constitutions. As we understand appellants' contention, they are urging that appellees proceeded to acquire property for the right-of-way without relying upon the power of eminent domain, but by the threat of the use of eminent domain appellees are inducing property owners along the proposed route to sell such property. Appellants have cited no case, and we have found none, which prohibits a governmental agency or private business, vested with powers of eminent domain, from acquiring private property without resorting to condemnation proceedings. That appellees are authorized to acquire property by *purchase* and *condemnation* (emphasis added) can not be questioned. Art. 6674w-3. We know of no requirement that condemnation proceedings be instituted if a mutual sale of such property can be consummated between the property owner and the condemning authority. This record contains no evidence of any threat being used by any of the appellees or their agents in acquiring property in question."

ARGUMENT

Question No. 1

It is Petitioners' contention that the Court of Civil Appeals of Texas for the Seventh Supreme Judicial District at Amarillo, Texas has decided a federal question of substance not heretofore deter-

mined by this Honorable Court and, in so doing, decided in such a way probably not in accord with applicable decisions of this Honorable Court.

There appears little doubt that federal action, within the meaning of the due process clause of the 5th Amendment to the Constitution of the United States, arises from those provisions of Title 23, United States Code, which (1) provide for the construction of a national system of Interstate and Defense Highways and Roads, (2) announce that such highways and roads are vital to the national defense and national interest and (3) provide for implementation thereof by the Highway Departments of the various states, in close cooperation with each other and the Secretary of Commerce. It is, of course, fundamental that neither the federal government nor any of its agents may do an act which results in the taking of property unless the act be done in strict compliance with written statutory law. The matter of compensation is not material unless and until the statutory procedure has been fully complied with. One of the conditions precedent to the location and construction of these highways is that the local State Highway Department must certify to the Secretary of Commerce that the economic effects of the location of the proposed highway have been considered by the said State Highway Department. Petitioners have consistently urged in the courts below and now urge to this Honorable Court that the Texas Highway Department, in its role as an agent of the federal government, did not consider the economic effects of the location of the highway in question in the manner envisioned by Title 23, United States Code."

The effect of this failure is that Petitioners will be deprived of title to their property, either voluntarily or through eminent domain proceedings, in order to permit the construction of an Interstate Highway in noncompliance with applicable federal law. Petitioners respectfully urge to this Honorable Court that such federal action constitutes a taking of their property without due process of law in violation of their rights secured under the 5th Amendment to the Constitution of the United States.

In passing on this issue, the appellate court below, at 353 S.W.2d 899, said in part:

> "Mr. Smith's affidavit stated in part as follows:
>
> > 'A transcript of this record was forwarded on August 30, 1957 to the Bureau of Public Roads along with *a certification by D. C. Greer, the State Highway engineer, that due consideration had been given the economic effects of the proposed location of the highway. The central route of such highway through the City of Amarillo was thereupon approved by the United States Bureau of Public Roads and the Texas Highway Commission.*'
>
> "In our opinion the record is clear that appellees have fully complied with the requirements of the applicable State and Federal Statutes and appellants' summary judgment evidence does not raise the material fact issue." [italics supplied]

As stated above, Petitioners do not challenge the fact of the certification, but *the reasonableness of the consideration evidenced by the certification.*

The record reveals that the proposed central route is through the approximate *center of the City*, that it will extend from the eastern city limits to the western city limits, and that it will be three hundred feet wide in most areas except for an interchange, with an already existing North-South expressway, covering several dozens of acres. In view of the magnitude of this project, and the obvious impact this location will have upon the city, it would appear that a very extensive and thorough study would necessarily have to be made of the economic effects that the routing would have upon the city before any location could be intelligently approved by the Texas Highway Department and submitted by it to the Secretary of Commerce for approval and integration with the Federal-aid highway system.

For supporting evidence in this record tending to show that no *proper consideration* was given to the economic effects as directed by the statute, Petitioners respectfully request that this Honorable Court consider an excerpt from the sworn deposition testimony of Respondent D. C. Greer, attached hereto as Appendix "B". Petitioners submit that the evasive, misleading and elusive character of Respondent D. C. Greer's answers to the questions patiently propounded to him; his admissions relating to maps submitted to the Secretary of Commerce which failed to show highly developed residential and commercial areas within the corporate limits of the City of Amarillo, through which and adjacent to which the proposed route would pass if approved by the Secretary; and his candid admission that he did not know whether or not any of the persons responsible for

federal approval of the central route had ever been over the proposed central route on the ground, constitute sufficient evidence at least to warrant a trial of this issue on the merits.

There is, however, other evidence placed in the record herein by the Respondents which supports Petitioners' contention. Quoting from the same affidavit of Mr. Smith, from which the appellate court below quoted, the following is taken from page 4:

> "In order to comply with the requirements of the Federal Aid Highway Act of 1956, a cost study was made, under my direction, for the purpose of comparing the actual costs of right of way, construction, perpetuation, and vehicle operation over these various routes. Computations were made with reference to the estimated average through-traffic of each route, resulting in an estimated cost on a vehicle-mile basis. Upon the completion of this study, I recommended to the State Highway Engineer that the "Central Route" as described above be designated as the route of Interstate Highway 40 through the City of Amarillo. This route is designed to also serve the City of Amarillo as an East-West Expressway, as well as to serve through-traffic. The Central Route was 1.5 miles shorter than the Northern Route and 1.0 miles shorter than the Southern Route, and the total cost per vehicle-mile was less than that for either of the other routes."

Assuming that these self-serving statements constitute evidence, the "study" referred to would not suffice to form a lawful basis for choosing the Central Route. Title 23, United States Code, Section 101(b) does not require that the choice of route be

based upon the "cheapest" or "shortest" route but, instead, requires that the economic effects of the route be considered from a *total standpoint*, keeping in mind that "*insofar as possible in consonance with this objective, existing highways located on an interstate route shall be used to the extent that such use is practicable, suitable, and feasible, it being the intent that local needs, to the extent practicable, suitable, and feasible, shall be given equal consideration with the needs of interstate commerce.*" Nowhere have Respondents even suggested that the total economic effects were considered or that Route 66, which also traverses the City of Amarillo from east to west, was "considered" as a possible route for Interstate 40.

QUESTION NUMBER 2

Petitioners contend that they were not afforded the right secured to them by Article 6674w-1, Vernon's Civil Statutes of Texas, to discuss at a public hearing, the design and schematic layout of the proposed location of Interstate 40. It is Petitioners' contention in this respect that a proper construction of this statute would require the Texas Highway Department to hold a hearing *during which* Petitioners would have the opportunity to discuss the design and schematic layout of the proposed highway location. It seems clear that this statute envisions a public hearing which would afford opportunity to any individual interested in the location of the highway the right to express his views before the entire group attending the hearing. An illustration of this may be found in this record with respect to the hearing that was had in August of

1957, heretofore alluded to and a transcript of which is attached to the Defendants' [Respondents here] reply to Plaintiffs' Motion for Summary Judgment in the trial court as appendix "A". This transcript shows that at the August, 1957 hearing various persons in attendance had the opportunity to express before the entire group attending the hearing their views concerning the general location then under consideration. An inspection of the transcript relating to the meeting of October 28, 1959, which also appears in appendix "A" noted above, will reflect that *Mr. Smith, speaking for the Texas Highway Department, stated point-blank that no one was to be permitted to express his views during the meeting, and that only after the meeting was adjourned would any opportunity exist to discuss design and schematic layout with a member of the Department and this only privately.*

Petitioners contend that this does not constitute a compliance with the requirements of the statute. There is a manifest difference between a person being afforded the opportunity to discuss, before a general meeting of the public and the representatives of the Highway Commission, his views concerning the feasibility of the proposed design and schematic layout for a highway, and the mere opportunity of privately discussing his views with some member of the Highway Department "after the hearing." To demonstrate the failure in this respect, the following words of Mr. Smith, District Highway Engineer in Amarillo are quoted from page 3 of the verbatim transcript of the hearing of October, 1958:

"* * * * You may recall that in the meeting held in August, 1957, opportunity was afforded any interested citizen to make a statement regarding any feature of the proposed Interstate Highway 40 location in and adjacent to Amarillo. At that time, a number of persons expressed their views relative to the location and route selected. *I would like to emphasize that this meeting [October, 1958] is held for information purposes primarily and since design is the primary purpose of this meeting, we will confine the formal portion to information from the stage.*

After the meeting is adjourned we will be glad to discuss individual problems with you and discuss design of any particular section of the express-way in which you might be interested. * * * * *"*

There is no doubt that the public hearing of October 29, 1958 was *the only hearing* intended by the Highway Department to comply with Article 6674w-1, Vernon's Civil Statutes of Texas. The following sentence is taken from page 20 of Respondents' brief in the appellate court below: "The second public hearing (October 29, 1958) was held to conform with the State Law." The same sentence and argument may be found on page 15 of Respondents' reply to Petitioners' Application for Writ of Error in the Supreme Court of Texas. It appears clear from the above-quoted statements of Mr. Smith and the verbatim transcript that this public hearing did not afford any person the opportunity to discuss the design and schematic layout of the proposed highway.

Some confusion exists in the opinion of the court below, where it is suggested that this error

might have been cured by the meeting of August, 1957. A portion of the opinion of the court, at 353 S.W.2d 900, reads as follows:

> "The supporting affidavit of the District Engineer, Charles W. Smith, clearly states that a public hearing was held in the Amarillo Municipal Auditorium on Friday, August 2, 1957, relative to the location of the route of the proposed highway. Details of this meeting were set out in the affidavit. Mr. Smith's affidavit further points out a second public hearing was held at the same location on October 29, 1958 where a schematic layout of the proposed highway was presented for public inspection. In our opinion the affidavits of appellants which are of record in this case do not effectively contradict the above referred to affidavit of Mr. Smith, and do not raise a fact issue as to these hearings. *The public hearings so held were in full compliance* with Article 6674w-1, Sec. 1, Vernon's Annotated Texas Civil Statutes."

And at 353 S.W.2d 900 the opinion of the court below states:

> "The two hearings referred to above were held for a two-fold purpose: to comply with Article 6674w-1, V.T.C.S. and Title 23, Sec. 128, U.S.C.A."

Petitioner would respectfully show unto this Honorable Court that *at the time of the August, 1957 hearing referred to by the appellate court below, Article 6674w-1, Vernon's Civil Statutes of Texas, had not yet become law.*

It seems to be clearly established that the only hearing at which Petitioners were afforded the opportunity for discussion was at the August, 1957

hearing *at which time no design and schematic layout information was available.* This fact is admitted by Respondents in their brief in the appellate court below on page 20 thereof, and in their Reply to Petitioners Application for Writ of Error in the Supreme Court of Texas on page 15 thereof.

At the October, 1958 hearing when design and schematic layout information was available no discussion envisioned by the statute was permitted.

The failure of the Respondents to properly comply with Article 6674w-1 will result in a taking of Petitioners' property by state action without due process of law, in violation of the 14th Amendment to the Constitution of the United States, since Petitioners' property will be taken either by eminent domain proceedings or the threat thereof for the purpose of Federal-aid highway construction in non-compliance with applicable state law.

For the purpose of keeping the record straight, Petitioners respectfully call this Honorable Court's attention to the opinion of the appellate court below, which reads, at 353 S.W. 2nd 900, in part as follows:

> "According to Mr. Greer's deposition, Federal funds had not been received by the State at the time his deposition was taken in May of 1960."

Petitioners would respectfully point out that at page 20 line 8 of Mr. Greer's deposition the following appears:

> "Q - - - and has the purchasing of right-of-way been approved yet by the Federal Government, Mr. Greer?

A They don't necessarily approve it. They have, *because we are using their money to purchase right-of-way,* partially."

At other places in the same deposition (see page 25) Mr. Greer denied that any Federal Funds had been received. This patent contradiction in a witnesses sworn testimony should have been submitted to a jury and not decided by the Court in ruling on Respondents Motion for Summary Judgment.

SUMMARY

Petitioners believe that there are great and appealing reasons why this Honorable Court should issue its Writ of Certiorari to review the decision of the court below. Implementation of Title 23, United States Code, is currently in progress in most of the States of the Union, and the safe-guard relating to the requirement that the various State Highway Departments must *reasonably* consider the economic effects which any proposed location of a Federal-aid highway will have on local conditions is vital not only to these Petitioners, but to many other thousands of citizens in the various States of the Union. Title 23, United States Code, provides that federal funds will pay 90% of the cost of purchase of right-of-way as well as construction. Petitioner is unable to state with accuracy the approximate amount of federal funds which will be expended within the corporate limits of the City of Amarillo, but surely it will be many millions of dollars, and the expenditures being made and to be made by the Federal Government in all of the States of the Union in the construction of Federal-aid highways will amount

to many millions more. If "local needs, to the extent practicable, suitable, and feasible, shall be given equal consideration with the needs of Interstate Commerce," as provided in Title 23, United States Code, Section 128(b), hereinabove set out, then certainly before any State Highway Department can lawfully propose any system of roads to the Secretary of Commerce, and properly certify that it has considered the economic effects of the location proposed, the spirit of the Federal Statute should be followed and failing this, this Honorable Court should not permit a Federal-aid highway to be constructed in blatant disregard of this important safeguard Congress has seen fit to engraft into Title 23, United States Code.

This Honorable Court has not heretofore ruled on whether the certification of a state highway department that it has considered the economic effects of a proposed Federal-aid highway under Title 23, United States Code, is reviewable, nor has it ruled on the character of the consideration which is proper under the statute. For this reason, Petitioners believe that the writ should issue.

It would also appear that in view of the failure of the Respondents to afford Petitioners a valuable right secured to them under State law, the court below has ruled in a manner probably not in accord with applicable decisions of this Honorable Court.

In addition it would appear, in view of the conflicting issues in the record herein alluded to, that this was not a proper case in which to render Summary Judgment. These issues should have been fully developed in a trial on the merits.

WHEREFORE PREMISES CONSIDERED, Petitioners respectfully pray that this court issue its Writ of Certiorari to the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo, and review said court's final decision in this case.

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San Antonio, Texas

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1800 Milam Bldg.
San Antonio, Texas
Attorney of Record

Attorneys for Petitioners on Application for Writ of Certiorari.

AFFIDAVIT OF SERVICE

I, Frank Y. Hill, Jr. one of the attorneys for the Petitioners, herein, and not a member of the bar of this Honorable Court, hereby certify that, on the 20th day of December, 1962, I served copies of the foregoing application for Writ of Certiorari on Respondents D. C. Greer, and the members of the Texas Highway Commission, by depositing the same in a United States Post Office with first class Postage Prepaid, addressed to said Respondents Council of Record as follows:

The Honorable Will Wilson
Attorney General of Texas
Capitol Station
Austin, Texas

The Honorable Morgan Nesbitt
Asst. Attorney General of Texas
Capitol Station
Austin, Texas

Frank Y. Hill, Jr.

Before me, the undersigned authority, on this day personally appeared Frank Y. Hill, Jr., known to me to be the person who affixed his name to the above and foregoing instrument and who, after being duly sworn, upon his oath deposed and said that the matters stated therein are true and correct and that he executed the same for the purposes therein stated.

IN EVIDENCE WHEREOF, witness my hand and seal of office this the 30th day of December, 1962.

Notary Public in and for
Bexar County, Texas.

SEAL

APPENDIX "A"

I. M. FUTCH *et al.*

v.

D. C. GREER *et al.*

No. 7095.

Court of Civil Appeals of Texas.
Amarillo.

Feb. 5, 1962.

Rehearing Denied Feb. 26, 1962.

DENTON, Chief Justice.

This is a suit brought by a group of citizens of the City of Amarillo as a class action, seeking an injunction against D. C. Greer, the State Highway engineer, and the members of the State Highway Commission and the City of Amarillo, its mayor, the city commission and city manager, to restrain the named defendants from designating, laying out, opening and constructing Interstate Highway Number 40 through the City of Amarillo. All parties filed motions for summary judgment. The City of Amarillo and its officials also filed a motion to dismiss on the ground the city and its officials were neither necessary nor proper parties to this suit. This latter motion was granted. The trial court entered a judgment granting the motion for summary judgment of Greer and the highway commission, denied the motion of appellants, and dismissed the City of Amarillo and its officials from the suit.

[1] Appellants have brought forward no point of error which complains of the trial court's action in dismissing the City of Amarillo and its impleaded officials. They have thereby waived any error the trial court may have committed in ordering the dis-

missal of these parties. Therefore that question is not before this court for determination. Porter v. Bell (Tex.Civ.App.), 287 S.W.2d 333 (writ refused n. r. e.); Francis v. Kane (Tex.Civ.App.), 246 S.W. 2d 279 (no writ history).

[2] Appellants' first point of error complains of the trial court granting appellees' motion for summary judgment after having stricken certain affidavits filed on the day of the hearing, and which were attached to appellees' reply to appellants' motion for summary judgment. This point is based on the premise that there are no affidavits to support appellees' motion for summary judgment. This latter motion had been filed and service obtained on June 10, 1960. Four affidavits were attached and filed with appellees' motion for summary judgment some six months prior to the hearing. These latter affidavits, not being subject to appellants' objection that they were filed on the date of the hearing, are therefore a part of the record and were properly before the trial court and this court. We understand appellants' position to be that when the affidavits attached to appellees' reply to appellants' motion for summary judgment were not allowed to be introduced into evidence there remained nothing to support appellees' motion for summary judgment. We are unable to agree with this contention. Appellees' motion was supported by affidavits of the district highway engineer and an Amarillo city official in addition to certified copies of minutes and a resolution of the City of Amarillo approving and endorsing the route and plan of construction of the proposed highway. We therefore conclude this point is without merit.

[3-5] Appellants next contend their motion for summary judgment was not controverted and that therefore the trial court erred in denying their motion. We recognize the general rule that where

pleadings, sworn statements and admissions show a party to be entitled to a summary judgment and the opposing party does not oppose these instruments, the trial court is justified in accepting the moving party's affidavits and motion as true and in entering a summary judgment. Sandone v. Dallas Osteopathic Hospital (Tex.Civ.App.), 331 S.W.2d 476 (refused n. r. e.) and cases cited therein. However, we are of the opinion this general rule has no application in the instant case. We do not construe Rule 166-A, Texas Rules of Civil Procedure as requiring that a motion for summary judgment can be controverted only by affidavits specifically replying to such motion. In our opinion appellees' own motion for summary judgment supported by affidavits and exhibits attached thereto, together with the deposition of appellee D. C. Greer, constituted sufficient opposition to appellants' motion. See Ragsdale v. McLaughlin (Tex. Civ.App.), 285 S.W.2d 467 (error dismissed). Summary judgments are not granted by default but only on the movant's discharge of his burden to show the absence of fact issues. Freeberg v. Securities Investment Co. of St. Louis (Tex.Civ.App.), 331 S.W.2d 825 (writ refused).

[6] Appellants' next four points of error complain of the trial court's failure to grant their motion for summary judgment on the ground that four specific requirements had not been met by appellees in locating and planning the highway in question. It is appellants' position that it is undisputed that appellees conducted no public hearing prior to laying out and constructing the interstate highway; that no schematic design had been presented at a public hearing; that no economic survey had been conducted; and that the Federal laws had not been complied with in selecting the route, design, etc., of the proposed highway. Because of the similarity of these matters they will be discussed together.

The supporting affidavit of the district engineer, Charles W. Smith, clearly states that a public hearing was held in the Amarillo Municipal Auditorium on Friday, August 2, 1957, relative to the location of the route of the proposed highway. Details of this meeting were set out in the affidavit. Mr. Smith's affidavit further points out a second public hearing was held at the same location on October 29, 1958 where a schematic layout of the proposed highway was presented for public inspection. In our opinion the affidavits of appellants which are of record in this case do not effectively contradict the above referred to affidavit of Mr. Smith, and do not raise a fact issue as to these hearings. The public hearings so held were in full compliance with Article 6674w-1, Sec. 1, Vernon's Ann. Tex.Civ.St. Title 23 U.S.C.A. § 128 provides:

> "§ 128. Public hearings
>
> "(a) Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic effects of such a location."

Mr. Smith's affidavit stated in part as follows:

> "Everyone present was afforded the opportunity to speak with reference to the route for Interstate Highway 40. A record was made of the various speakers, their comments, criticisms, and suggestions, and a transcript of this record was forwarded on August 30, 1957 to the Bureau of Public Roads along with a certification by D. C. Greer, the State Highway Engi-

> neer, that due consideration had been given the economic effects of the proposed location of the highway. The central route of such highway through the city of Amarillo was thereupon approved by the United States Bureau of Public Roads and the Texas Highway Commission."

In our opinion the record is clear that appellees have fully complied with the requirements of the applicable State and Federal statutes and appellants' summary judgment evidence does not raise a material fact issue.

[7] Appellants further contend that Federal rather than State statutes govern in determining the location, laying out and constructing this interstate highway; that in as much as the Federal statutes had not been complied with in these respects the trial court erred in granting appellees' motion for summary judgment. We think appellants are in error in their contention that the Federal statutes were not complied with. We find nothing in this record to support appellants' assertion. According to Mr. Greer's deposition, Federal funds had not been received by the State at the time his deposition was taken in May of 1960. By complying with Federal regulations the State would be reimbursed by the Federal government for certain sums previously expended by the State. The two hearings referred to above were held for a two-fold purpose: to comply with Article 6674w-1, V.T.C.S. and Title 23, Sec. 128, U.S.C.A. The Federal regulations must be complied with in order to receive Federal funds. Such requirements do not limit or effect the authority of the State Highway Commission to select locations, construct and maintain highways in this State. State Highway Commission v. Humphreys (Tex. Civ.App.), 58 S.W.2d 144 (writ refused); Heathman v. Singletary (Tex.Comm.App.), 12 S.W.2d 150. See also Linnecke v. Dept. of Highways, 76

Nev. 26, 348 P.2d 235; Piekarski v. Smith (Del.), 153 A.2d 587. Appellants' sixth point of error is overruled.

[8] Appellants' last four points of error complain that the trial court's judgment violated the due process clauses of both the Federal and State constitutions. As we understand appellants' contention, they are urging that appellees proceeded to acquire property for the right-of-way without relying upon the power of eminent domain, but by the threat of the use of eminent domain appellees are inducing property owners along the proposed route to sell such property. Appellants have cited no case, and we have found none, which prohibits a governmental agency or private business, vested with powers of eminent domain, from acquiring private property without resorting to condemnation proceedings. That appellees are authorized to acquire property by *purchase* and *condemnation* (emphasis added) can not be questioned. Art. 6674w-3. We know of no requirement that condemnation proceedings be instituted if a mutual sale of such property can be consummated between the property owner and the condemning authority. This record contains no evidence of any threat being used by any of the appellees or their agents in acquiring property in question.

We are not unaware of the hardships and inconveniences that have and will be incurred by many property owners within and near the proposed interstate highway. However, it is not the prerogative of this court to approve or disapprove of the layout or location of this highway. This is the duty of the appropriate authorities who must act according to the prescribed procedure under the law. After reviewing this record, consisting of numerous affidavits and exhibits, we are convinced the appellees have scrupulously observed and followed the applicable Federal and State laws in proceeding with the

designation, laying out, and constructing the interstate highway under consideration. We are of the opinion, and so hold, that appellees' pleadings, affidavits and exhibits support the trial court's conclusion that no genuine material fact issue was raised, and that the record supports a summary judgment for the appellees.

By counterpoint appellees bring forward their plea in abatement in which it is pleaded that this is a suit against the State, and no legislative consent was given. The trial court's judgment does not expressly pass on this plea. However, in view of our disposition of this case we do not deem it necessary to discuss this counterpoint.

After carefully reviewing this record we are of the opinion it reflects no reversible error. The judgment of the trial court is affirmed.

APPENDIX "B"

Appendix "B" consists of page 31, line 7 through page 40, line 13 of the sworn deposition testimony of Respondent D. C. Greer as same appears in the record herein, as follows, to-wit:

"Q * * * * Now, Mr. Greer, when you go into the economic surveys to determine the effects of any given project on an urban area, particularly when it goes through that urban area, rather than by-passing it, generally, what do you take into consideration to determine the economic effects of that particular route?

A We comply with the statute as interpreted to us by the operating element of the Federal Government that carries out the federal laws, Bureau of Public Roads.

Q Well, what do you do, Mr. Greer, that is, in your opinion, carrying out that federal statute? That is the thing that I want to know.

A As you know, the law says, "Considered the economic effects of such a location."

Q Well, let me get it this way. When you project a particular routing through a city, as I understand it, it is imperative that that routing show the development around that—the routing proposed show the development of the area around it in order to determine whether or not you need interchanges or access roads or exits or surface roads or frontal roads; that is correct, is it not?

A We make origin and destination studies, showing where people are coming from and where they are going to.

Q Well, that, as I understand, is your traffic count?

A That is for the basis of determining where you need interchanges and where you don't.

Q Isn't it also a vital factor, Mr. Greer, to determine whether you are going to need an interchange at a given point, or whether you need frontal roads in any given area, to take into consideration whether that highway is running through a highly populated area or a rural area to determine whether it needs interchanges or whether it needs frontal roads?

A It is necessary to make all sorts of studies.

Q Yes; I know.

A We can best serve our people at minimum cost with devices considered in design, yes, sir.

Q Let me put it this way. You have built numerous access-controlled State highways through cities, and you naturally, as I understand it, take into consideration the populated area around it, to determine where to have access for it and where to make exits. I am talking about where you have complete say as to what is going onto it and what is going to go off of it, and where your access - - -

A I think the answer to your question, if I understand it correctly, is yes - - -

Q All right.

A - - - but let me explain it by saying this, that in Texas we believe in serving both through traffic and local traffic as we are going through - - -

Q All right.

A - - - and we are a traffic agency, bear in mind, not a real estate agency.

Q Yes, sir.

A At the same time, we do not want to damage real estate; we hope we help it.

Q Yes, sir.

A But our criterion is the movement of traffic, both local and through traffic.

Q I am not making myself clear, Mr. Greer. Let's say, for instance, that you are building a State highway that was under your jurisdiction through a city. You would naturally take into consideration the developed areas of that city around that highway to determine where you would permit access on and off the highway, wouldn't you, in controlling its access?

A Of course, a normal state highway is not a controlled access on- - -

Q I am talking about, though, where you are building for the State.

A Yes.

Q In the State highway system, where you are building controlled access highways - - that is, access controls; you take into consideration the area immediately around it when you- - - -

A We lean, in the Texas Highway Department, distinctly in the direction of serving the localities through which we pass.

Q Well, and the reason I am asking you - - -

A Whether it be State - - -

Q All right.

A - - - Federal, Interstate, or anything else.

Q This instrument which I will hand you, Mr. Greer, that has been marked as Plaintiffs' Exhibit No. 3, assuming that the wording - - the arrow is pointing north - - assuming this map

fails to correctly portray the developed areas of the City of Amarillo surrounding Interstate 40, wouldn't that evidence have a great deal of effect as to whether we could get frontal roads, interchanges, or accesses to that highway?

A This particular exhibit is for the purpose of route - - -

Q Yes, sir; yes, sir.

A - - - and again I repeat that it has nothing to do with interchanges or frontage roads.

Q Well, I understand, but what I am getting at, Mr. Greer, assuming - - - now, looking, assuming that the arrow is pointing north, as it does - - - looking at the southwest area of Amarillo, which is the left-hand lower corner, it shows it to be vacant property, doesn't it?

A Yes, sir.

Q All right. Now, assuming that that was a highly populated area that is not shown on the map, assuming that one of the most expensive shopping centers in Amarillo is not revealed in the map, but is shown to be vacant property, assuming that the whole area on that left-hand lower portion shown to be vacant property is highly developed area, and assuming that it is one of the most expensively residentially developed areas in the City of Amarillo, then don't you think that that might have had some effect as to the location of that highway?

A To the routing of the highway?

Q Yes, sir; not only to routing, but as to whether or not the Federal Government would permit you to put frontal roads on it or additional interchanges in that area down in there that is shown to be vacant property - - - and I assure

you it is highly developed - - and it is shown to be grass land.

(Discussion off the record)

MR. WEBSTER: That map is not designed to show the populated areas, is it?

MR. KINNEY: Not at all; it is just very skimpy, just to show the outline of the city and streets.

MR. CLAYTON: Isn't that the one that you sent to the Federal Government for approval of location?

MR. KINNEY: Yes, but it is not based on detailed information.

Q Well, Mr. Greer, if a map is sent to the Federal Government for routing location, that does not correctly portray an area of the City of Amarillo that is highly developed, and does not correctly portray one of the most expensive, at least, two of the most expensive residential development areas in the city, couldn't it possibly have had some effect on whether that routing would have been approved or disapproved?

A I doubt it.

Q Well, could it?

A I doubt it. I previously testified that this map - - the approval of the United States Bureau of Public Roads was by a man by the name of J. M. Page - - -

Q Yes, sir.

A - - - who is the District Engineer for the State of Texas. Mr. Page and his men go out and walk over these routes. If there is some error of omission in these maps, they readily detect that. It is not done solely from maps.

Q Well, I understand that, but what I am asking you, Mr. Greer, is that, assuming that that road, the routing that was approved by the Federal Government, goes through a lot more of a developed city than is shown on that map, don't you think it might have had some effect on whether it would have been routed that way or not?

A No, because all of the men, the officials of the Texas Highway Department and the officials of the Bureau of Public Roads that had to do with the approving of the map, knew exactly what was on the ground, whether it was shown on the map or not.

Q Then you think that the final approving authority of the Federal Government was fully cognizant of the development of an area that is not shown on that map?

A Yes, I do.

Q All right, sir. What do you base that conclusion on, Mr. Greer?

A Because of the fact of the length of time - - it takes time, ordinarily, to peruse these things - - - and the number of trips; I happen to know that they move out in the areas and walk up and down these lines and drive over them.

Q Do you know whether or not Mr. Page ever went out there and looked at them himself?

A I can't under oath testify whether he did or did not, but I would almost swear that he did.

Q Do you know from your own knowledge that the man who approved it - - assuming Mr. Page here, as shown - - ever did go out and look at that area and see whether it was developed or vacant land?

A I can't swear that he did, no, sir.

Q All right.

A I can get a statement from him if it would help you.

Q Well, let me ask you this, Mr. Greer. If you were constructing a controlled access highway going through the City of Amarillo that was part of the State system, and you determined what access controls would be put on; you would give strong credence to the areas around it, as to where you would have exits and entrances onto that controlled highway, wouldn't you?

A Yes, I would, and we have in this case.

Q And it would have a strong bearing on it, wouldn't it?

A Yes, sir.

Q Well, the Department has, but you don't know what the Federal Government has done on it in approving it, do you?

A They approved everything we submitted to it.

Q Did you submit any other map than that P-3 there?

A Yes, sir; we submitted a map of schematics which shows - - -

Q Would it show the populated area?

A I am not sure of that, but it is based on general knowledge of everything available for - - -

Q Let's assume, Mr. Greer, that someone in Washington, or even in Fort Worth, approves it, that hasn't been on the ground, and they only went by the maps submitted for routing approval, and it didn't show a highly populated area and

a highly developed area, that would be of some significance to that approving authority, wouldn't it?

A That is a leading question; you ask an assumption and whether or not it would - - - -

Q Well - - -

A I will say to you that I have only been with the Highway Department - - -

Q Yes, sir.

A - - - thirty years, and in that thirty years I have never known of them to approve of one without going on the ground.

Q Do you know, Mr. Greer, where the difficulty is that we are having on frontal roads now in Amarillo?

A I can't spot it; we have a request from the City of Amarillo for frontage roads in addition to those that were included on - - -

Q Now, let's assume that those frontal roads - - you say "in addition" - - are over in that vacant area over there that we are talking about.

A All right.

Q Now, if that map would have shown an extended development of the City of Amarillo on out in that direction, would there have been no reason to have stopped frontal roads where they were stopped?

A Basically, the Bureau of Public Roads would prefer that we have practically no frontage roads.

Q Well, I understand - - - -

A We like frontage roads.

Q Yes, sir.

A We think they are good for the community.

Q I appreciate your - - -

A If that area justifies frontage roads, as far as the Texas Highway Department is concerned, we are going to do everything we can to get them in there.

Q I appreciate your position in it, but I am trying to find out the particular facts in this case. As I understand it, our frontal roads were stopped about where that vacant area is shown on that map.

A I do not know that.

Q Well, that is my understanding.

A I mean, because I don't know.

MR. CLAYTON: Where is it, Hadley?

MR. EDGAR: Let's go off the record.

(Discussion off the record)"

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NO. 710

IN THE

SUPREME COURT OF THE UNITED STATES

I. M. FUTCH, ET AL.,
Petitioners,

vs.

D. C. GREER, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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Respondents.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now come the respondents, D. C. Greer, the State Highway Engineer, and the members of the State Highway Commission of the State of Texas, and respectfully file this Brief in Opposition to the Application for Writ of Certiorari.

JURISDICTION

Respondents respectfully suggest that this Honorable Court is without jurisdiction in this case and that no federal question, and certainly no federal question of substance, is presented for adjudication.

Petitioners allege jurisdiction under Title 28, U.S. C.A., Section 1257, on the basis that a right is specially set up or claimed under the Constitution of the United States. It is not entirely clear just what this right is. The suit seeks an injunction to restrain the respondents from laying out and constructing an interstate highway through the city of Amarillo, petitioners being dissatisfied with the route or design, or both, of the proposed highway. No taking of property is involved in this case.

We know of no authority, and petitioners have referred us to none, which holds that petitioners have any constitutional right or privilege to lay out or design interstate or state highways. There is ample authority to the contrary.

QUESTIONS PRESENTED

Petitioners have alleged that two questions are presented in this application, stating their first question as follows:

> "1. Whether the certification by a state highway department that it has considered the economic effects of the location of a Federal-aid highway in conformity with Title 23, United States Code, Section 128(a) is reviewable on the grounds that reasonable consideration was not given such economic effect in the light of the announced purposes of Title 23, United States Code."

Respondents will show that this does not present any constitutional question as far as petitioners' rights are concerned, and at best might give rise to a dispute between the Bureau of Public Roads and the Texas Highway Department. In any event, compliance or non-compliance with this federal law has no bearing on the authority of the State Highway Commission to select locations, construct and maintain highways in this state. True, the State must comply with this law and regulations thereunder to obtain federal funds, and has so complied in this instance, as evidenced by the fact that the project has been approved by the Bureau of Public Roads.

Petitioners state their second question as follows:

> "2. Whether certain provisions of Article 6674w-1, Vernon's Annotated Civil Statutes of the State of Texas, are satisfied by a public hearing being held during which no member of the public was permitted to discuss or express his or her views concerning the design and schematic layout of a Federal-aid highway."

Respondents will show that the factual basis upon which this question is predicated, i.e., that no member of the public was permitted to discuss or express his views concerning the design and schematic layout of the highway, is directly contrary to the facts of record, but in any event this does not present a federal question and our State courts have held in this case that the respondents fully complied with the applicable State statute in conducting the public hearing.

STATEMENT

Pursuant to Article 6674w, Vernon's Texas Civil Statutes, and related articles, the State Highway Commission is given rather broad powers to lay out, construct, maintain and operate a modern State Highway System. As part of this system, a highway traversing the City of Amarillo was planned and was or is being designed in such a manner as to be eligible for participation by the Federal Government in part of its cost. Several routes were studied and considered and the District Engineer of the Texas Highway Department recommended the so-called "Central Route" to his superiors. (Affidavit of Charles W. Smith, District Engineer, Exhibit "A" attached to Defendants' (respondents here) Motion for Summary Judgment.)

To comply with the requirements of the Federal-Aid Highway Act of 1956 (Title 23, United States Code) and specifically Section 128 thereof, a public hearing relative to the route of this highway was conducted on August 2, 1957, at 7:30 p.m. in the Municipal Auditorium in Amarillo. This hearing is described by Mr. Smith in his affidavit as follows:

> "As a representative of the Texas Highway Department and the Texas Highway Commission, I presided over or conducted this public hearing on August 2, 1957 at 7:30 P.M. at the Municipal Auditorium in Amarillo, Texas. Out of the estimated 600 persons who attended this hearing, no less than 22 persons indicated a desire to speak and did speak. Everyone present was afforded the opportunity to speak with reference to the route for Interstate Highway 40. A record was made of the various speakers, their comments, criticisms, and suggestions, and a transcript of this record was forwarded on August 30, 1957 to the Bureau of

Public Roads along with a certification by D. C. Greer, the State Highway Engineer, that due consideration had been given the economic effects of the proposed location of the highway. The central route of such highway through the city of Amarillo was thereupon approved by the United States Bureau of Public Roads and the Texas Highway Commission." (Exhibit A, Defendants' Motion for Summary Judgment, p. 5.)

Following approval of the route of the highway, the State Highway Department's engineering staff prepared schematic plans relative to the design of the highway, showing location and types of structures, tentative location of exit and entrance ramps and frontage roads, and in general the right of way required to construct the facility. Upon completion of these plans, a second public hearing was held on October 29, 1958, in the Amarillo Municipal Auditorium. This hearing was held to comply with the Texas statutory provision contained in Article 6674w-1, Vernon's Texas Civil Statutes, reading as follows:

". . . provided, however, that in the case of any project involving the bypassing of or going through any county, city, town, or village, including Home Rule Cities, the State Highway Commission shall afford the opportunity for not less than one (1) public hearing in the locality before an authorized representative of the State Highway Commission, at which persons interested in the development of the project shall have the opportunity for attendance, discussion and inspection of the design and schematic layout presented and filed with the governing body of such county, city, town or village, including Home Rule Cities, at least seven (7) days before the public hearing, by the State Highway Department."

This hearing is described in Mr. Smith's affidavit as follows:

"On October 21, 1958, I notified the mayor of the city of Amarillo of the schedule of this public hearing and transmitted to him a print of the schematic layout for that section of the highway which traverses the city of Amarillo and advised him that such layout was for his files and to be made available for public inspection for at least one week prior to the date of the proposed hearing.

"On October 29, 1958, a second public hearing was held in the Municipal Auditorium in the city of Amarillo. Beginning at 10 o'clock A.M. on that morning, there was open to the public a vast array of exhibits including the schematic layout of the proposed highway, typical structures, interchange design, and all other features of highway design on a proposed highway. These exhibits were placed in various strategic and public places to be most conveniently available for public inspection and with personnel of the State Highway Department available at each exhibit to answer any and all questions propounded to them by interested citizens. These exhibits remained on continuous display from 10 o'clock A.M. to 6 o'clock P.M., during all of which time representatives of the Highway Department were on duty and answered questions propounded to them by interested citizens.

"7. Wide publicity was given to the public hearing held on October 29, 1958. News stories in prominent positions in the local press were published on several occasions, including the date October 21, 1958 at which time notices appeared in the Amarillo Globe-Times and the Amarillo Daily News.

"8. The formal part of the second public hearing commenced at 2 o'clock P.M. on October 29, 1958 in said Municipal Auditorium in Amarillo in which

full explanation was made of the highway design, the purposes of the highway, as well as the details of the schematic layout. Immediately after, as well as before, the explanation of the project and the schematic layout, full opportunity was afforded all interested citizens to ask specific questions of the representatives of the Highway Department, including myself, about the effect of the highway on their own individual properties and business interests." (Exhibit A, Defendants' Motion for Summary Judgment, p. 6-7.)

On January 19, 1959, this injunction suit was filed by petitioners. The trial court rendered summary judgment for respondents, which action was affirmed by the Texas Court of Civil Appeals at Amarillo in an opinion reported in 353 S.W. 2d 896 and attached to petitioners' application as Appendix "A." The Supreme Court of Texas refused petitioners' application for writ of error, no reversible error.

ARGUMENT AND AUTHORITIES

Question No. 1

Petitioners do not now deny that the public hearing was held August 2, 1957, for the purpose of complying with Title 23, U.S.C.A., Section 128. They do not challenge the fact that the Highway Department certified to the Bureau of Public Roads that due consideration had been given to the economic effects of the proposed highway location. They simply contend that the Highway Department did not give "reasonable consideration" to such effects.

We will not burden this brief with a discussion of the facts (the transcript of the hearing shows that the "economic effect" of the location was the major topic

of the discussions, affidavits show various studies and comparisons were made and economic effects necessarily considered), because it is immediately apparent that this contention cannot affect any constitutional rights of petitioners. Whether state funds exclusively, or part state and part federal funds, are used to pay for the highway has no bearing on the duly delegated authority of the Highway Commission to select locations for highways in this state and in effect is no concern of petitioners.

This contention is so lacking in substance that every time a similar question regarding the regularity of such hearings or the compliance with Section 128 has been raised the courts have promptly and unanimously rejected it.

In *Hoffman v. Stevens,* 177 F. Supp. 898 (D.C. Pa. 1959), the State Highway Department had advertised the project but no hearing was in fact held as the Department alleged that none were requested. The Court said:

> "Assuming arguendo a hearing was requested and was not held it would not give rise to any constitutional question so far as plaintiffs' rights are concerned. Certainly it is not sufficient reason for a federal court to assume jurisdiction under the due process clause. Combs v. Illinois State Toll Highway Commission, supra, 128 F. Supp. at page 310. The provision in § 128 was obviously intended to insure wise and fair use of federal funds. Under Pennsylvania law and policy, absent federal aid, such hearings are not required or held. *At best, failure to afford a hearing might give rise to a dispute between the Secretary of Commerce and the Pennsylvania Department of Highways as to the allocation and use of federal funds.* See and

cf. Piekarski v. Smith, Del. Ch. 1958, 147 A. 2d 176, 182; Binghamton Citizens Penn-Can Route 17 Highway Committee v. Federick, 3rd Dept., 1958, 7 A.D. 2d 170, 180 N.Y.S. 2d 913, 915." (Emphasis supplied.)

In *Linnecke v. Department of Highways*, 348 P. 2d 235 (Nev. Sup. Ct. 1960), the court said:

"The learned district judge filed a written opinion in denying the injunctive relief sought, holding first, that 'the giving of notice, the holding and the conduct of the public hearing, are matters of concern to the taxpayers of Nevada only insofar as they are conditions precedent to the authorization and grant of federal aid to the ultimate construction. If the notice should be insufficient, if the hearing is inadequate, if the required certificate is lacking, then the Bureau of Public Roads must determine that deficiency * * *.' He held, secondly, that in any event because of 'the hearing had, the consideration given to economic effects, and the certification made by letter, [these things] were sufficient to meet the broad and general requirements, and that there had been substantial compliance with the provisions of [the federal] act.'

"We have concluded that the judgment of the lower court was correct for both of the reasons given. The only requirement for a public hearing is the one quoted from the applicable section of the Federal Aid Highway Act. No such hearing is required by any such statute of this state. In a similar case the Supreme Court of Delaware had the same two questions for consideration. It said: 'But all the criticism of the public hearings is beside the point. The state law requires no public hearing. The federal statute, as already noted, does require such a hearing. The State must comply with the federal law to obtain federal funds. It has so complied, because the project has been approved by the Bu-

reau of Public Roads. The argument is beside the point.' Piekarski v. Smith, Del., 153 A. 2d 587, 593. . . ."

As noted from the foregoing quotations, the courts in New York and Delaware are in accord with these views. The Supreme Court of Wyoming in *Town of Clearmont v. State Highway Comm.*, 357 P. 2d 470 (1960) held exactly the same.

Petitioners make the frivolous claim on page 20 of their application that they will be deprived of their property in noncompliance with applicable federal law and that such "federal action constitutes a taking of their property without due process of law in violation of their rights secured under the 5th Amendment to the Constitution of the United States." No taking of property or eminent domain is involved in this case, and in fact most of petitioners do not even allege that they own property which is in the proposed right of way or will be required for the highway. But if or when any property is taken it will be by the State, not a federal taking, and the State has this power and can exercise it and build exactly this same highway without any reference to federal law or compliance with Section 128. The constitution and statutes of the State of Texas prohibit the taking of private property for public use without payment of just compensation and afford petitioners or other property owners adequate protection and legal remedies.

The following well established principles cited by the court in *Hoffman v. Stevens*, supra (177 F. Supp. at page 903), clearly show that petitioners have presented no substantial federal question and that their argument is entirely without merit:

"... 'The power of eminent domain is an attribute of sovereignty * * *. It cannot be surrendered, and if attempted to be contracted away, it may be resumed at will.' State of Georgia v. City of Chattanooga, 1924, 264 U.S. 472, 480, 44 S. Ct. 369, 370, 68 L. Ed. 796. It is not dependent upon any specific grant. Albert Hanson Lumber Co. Ltd. v. United States, 1923, 261 U.S. 581, 587, 43 S. Ct. 442, 67 L. Ed. 809. With its exercise the United States has no right to interfere by any of its departments. Boom Co. v. Patterson, 1878, 98 U.S. 403, 406, 25 L. Ed. 206. The particular manner or source of payment is not plaintiffs' concern. Spann v. Joint Boards of School Directors, 1955, 381 Pa. 338, 350, 113 A. 2d 281.

"'Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the XIV Amendment.' Bragg v. Weaver, supra, 251 U.S. at page 58, 40 S. Ct. at page 63; Joslin Mfg. Co. v. City of Providence, supra, 262 U.S. at page 678, 43 S. Ct. at page 689; Rindge Co. v. County of Los Angeles, 1923, 262 U.S. 700, 709, 43 S. Ct. 689, 67 L. Ed. 1186; State of Georgia v. City of Chattanooga, supra, 264 U.S. at page 483, 44 S. Ct. at page 371. Whether a particular property is needed for public use is likewise a legislative or executive, not a judicial question. United States v. Carmack, 1946, 329 U.S. 230, 247, 67 S. Ct. 252, 91 L. Ed. 209, 18 Am. Jur. Em. Dom. §§ 105, 106."

Question No. 2

The gravamen of petitioners' argument under Question No. 2, relating to the hearing to comply with Article 6674w-1, Vernon's Civil Statutes of Texas, is that

the hearing did not afford any individual the opportunity to express his views *before the entire group attending the hearing*. Petitioners do not dispute that the hearing was in fact held, or that the design and schematic layout was presented and available, or that Highway Department personnel was on hand to discuss the plans.

The statute in question (quoted on page 5, supra) simply provides for a public hearing at which persons interested in the development of the project ". . . shall have the opportunity for *attendance, discussion* and *inspection* of the design and schematic layout . . ." (emphasis supplied). As seen from Mr. Smith's affidavit, quoted previously on pages 6 & 7, the meeting lasted from 10 a.m. to 6 p.m., during which time the plans and exhibits were available for inspection and discussion with Highway Department personnel, and it was only during the so-called "formal" part of the hearing commencing at 2 p.m., when Highway Department and Bureau of Public Roads personnel spoke from the stage and slides were shown to give detailed information on the design, that the audience was requested to confine that portion "to information from the stage." Full opportunity for the "discussion and inspection" of the schematic layout, as contemplated by the statute, was obviously afforded. Had the Texas Legislature wanted some quasi-judicial hearing, or had it wanted to provide petitioners an audience for their remarks, it could easily have so specified.

Respondents think it clear that the Court of Civil Appeals correctly held the public hearing was in full compliance with Article 6674w-1, and think it equally clear that no federal question is presented by this argument in any event.

CONCLUSION

Respondents respectfully submit that petitioners have not alleged any substantial federal question and that their contentions are entirely lacking in merit, and respectfully pray that the Application for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Waggoner Carr, Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do now enter my appearance in the Supreme Court of the United States in the above captioned cause, in behalf of the Respondents; I do further certify that copies of the foregoing brief have been forwarded by United States Mail, First Class, Postage Prepaid, to Frank Y. Hill, Jr., 1707 Milam Bldg., San Antonio, Texas, and Ben F. Foster, 1800 Milam Bldg., San Antonio, Texas, attorneys for Petitioners.

WAGGONER CARR
Attorney General of Texas

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